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ARTICLES

The legal profession post-ADR: From mediation to collaborative law – *Anne Ardagh* and *Guy Cumes*

This article examines the changing role of the legal profession with regard to the incorporation of alternative dispute resolution (ADR) and collaborative law into legal practice. Lawyers have adapted to ADR, both in the ways in which they have adopted mediation as a form of practice within the litigation cycle and also in the way they seek to incorporate ADR within the profession through, eg collaborative law. While change within legal practice is welcomed, reflection is needed about the nature of these developments. The point has been reached in the development of mediation in Australia where we need to seek answers to questions about where lawyer mediation is situated as a dispute resolution method, how it is defined and practised, and whether the practice of collaborative law better serves the community. 205

Dispute resolution in Australia – the movement from litigation to mediation – *Brendan French*

Given that alternative dispute resolution (ADR) has proliferated so widely – and sometimes wildly – in recent years, it is easy to forget that (in its contemporary incarnation at least) it is only a generation old. It should not be surprising, then, that much of the ADR terrain remains unmapped and many of the standards of a mature discipline are yet to be agreed upon. This article provides a brief overview of the development of ADR in Australia, touching upon its rapid institutionalisation within the courts, ombudsmen and industry. In several instances, initial reservation about the value of ADR has been wholly overturned and replaced with a zealous, even uncritical, acceptance. For all of its undoubted contribution to the modern decision-making toolbox, scholars and practitioners need to be mindful that there remain significant issues yet to be properly discussed and debated. 213

Judicial review of decisions made by industry ombudsman schemes – *Damien Sams*

Industry ombudsman schemes are vested with powers to impose binding decisions on their membership where a dispute brought by a complainant to the scheme cannot be resolved through other means and the ombudsman considers there are grounds to proceed to a binding decision. Does the prospect of judicial review of such decisions pose a threat to the independence or viability of industry ombudsman schemes? What characteristics of a

binding decision might make it vulnerable to being overturned by the court? This article briefly discusses the three challenges to industry ombudsman binding decisions that have been heard in Australian courts in the past decade as well as some British precedents, and argues that there is little cause for alarm. 222

Mediation and administrative merits review: An impossible goal? – *Niamh Kinchin*

The benefits of mediation within the litigious realm have long been established. But what happens when the dispute falls within the forum of administrative merits review? The unique characteristics of a dispute created from an administrative decision may not accommodate the philosophy, logistics or procedures of mediation. The power dichotomy of the disputants, inflexible decisions within institutionalised contexts and public policy concerns all work together to present mediators with a challenging environment for open and earnest negotiation. Consideration of the appropriateness of mediation within this forum must take into account both the context (the objectives of the court or tribunal, the potential for bias, and whether the mediation is mandatory) and the content (the power differences of the parties, the appropriateness of confidentiality and the ability to monitor "fairness") of the decision being reviewed. Only then can the objectives of mediation and administrative merits review both be accommodated. 227

The family law dispute resolution spectrum – *Donna Cooper*

In recent times the Australian family law dispute resolution system has become increasingly complex and there have been a variety of processes specifically developed for family disputes. This has meant that non-adversarial practice in Australian family law has expanded and that both dispute resolution practitioners and family lawyers require a high level of understanding of the system in order to effectively operate within it. This article assists both groups of practitioners by creating a conceptual framework for the dispute resolution options available to family law clients. It describes and categorises the array of options and then locates them along a linear family law dispute resolution spectrum. Such a conceptual framework can also assist family lawyers to effectively advise and prepare their clients. 234

Effective conflict resolution training through case studies – *Mieke Brandon* and *Tom Stodulka*

This article explores the benefits of trainee mediators learning through the case study method to handle conflict within a dispute. The case study method of teaching helps participants in mediation training courses to regard conflict resolution as a process for meaning-making and meaning-transformation. In such a process, problems can be defined while relationships are respected and protected. The authors argue that mediators need to be able to recognise that parties' understanding of the significance of the events that lead up to the dispute is created as a result of their emotional experience of the conflict. The article will illustrate that the chronology of a dispute can be examined through presentation of a real-life case study which encourages mediators, as adult learners, to be actively involved in dialogue about the complexities and the process of negotiating a resolution. It asserts that case study teaching and learning is a facilitative, participant-centred and elicitive process that most effectively mirrors how mediators are to work in practice. 245

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